

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRANCISCO CARLOS-FLORES)	CASE NO.:14-cv-96 AJB
Petitioner,)	CRIM. NO.:12-cr-05149 AJB
v.)	ORDER DENYING
UNITED STATES OF AMERICA)	PETITIONER'S MOTION
Respondent.)	UNDER 28 U.S.C. § 2255 TO
)	VACATE, SET ASIDE, OR
)	CORRECT SENTENCE BY A
)	PERSON IN FEDERAL
)	CUSTODY

[Doc. No. 25 in 3:12-cr-05149]

Presently before the Court is Petitioner Francisco Carlos-Flores' ("Petitioner") motion to vacate, set aside, or correct his conviction and sentence pursuant to 28 U.S.C. § 2255. (Doc. No. 25.) Petitioner, a federal inmate proceeding *pro per*, seeks relief based on the claim of ineffective assistance of counsel. (*Id.*) He alleges his attorney, Ms. Holly Hanover, wrongfully relied on the Probation Officer's and Government's reports, which reflected that Petitioner was convicted of felony possession of a controlled substance for sale. (*See id.* at 2.) He further alleges that if she had conducted an independent investigation, she would have found there is no record of the felony conviction. (*Id.*) Finally, Petitioner alleges that due to his attorney's wrongful reliance

1 and advice to him, he is serving a longer sentence than permitted by law because he was
2 incorrectly categorized as an aggravated felon. (*See id.*)

3 Pursuant to Civil Local Rule 7.1.d.1, the Court finds the motion suitable for
4 determination on the papers and without oral argument. Moreover, the records conclu-
5 sively demonstrates that Petitioner is not entitled to relief. *See* 28 U.S.C. § 2255(b).
6 Accordingly, the motion hearing set for March 13, 2014 is hereby vacated. Having
7 considered the parties' arguments, and for the reasons set forth below, the Court DENIES
8 Petitioner's motion to vacate, set aside, or correct his sentence.

9 **I. BACKGROUND**

10 Petitioner, pursuant to a January 8, 2013 Plea Agreement, pleaded guilty to being a
11 removed alien found in the United States in violation of 8 U.S.C. § 1326(a) and (b).
12 (Doc. No. 10.) Under the Plea Agreement, Petitioner confirmed that his guilty plea was
13 knowing and voluntary, he understood the charges against him and the consequences of
14 his plea, and he had a full opportunity to discuss the facts and circumstances of his case
15 with his attorney. (*Id.* at 5.) He also waived his right to appeal or collaterally attack his
16 8 U.S.C. § 1326(a) and (b) conviction and sentence. (*Id.* at 10–11.) Petitioner admitted
17 that in addition to the instant charge, "[o]n or about February 21, 2012, [Petitioner]
18 suffered a felony conviction for Possession of a Controlled Substance for Sale" in
19 violation of California Health & Safety Code § 11378. (*Id.* at 3.) He also admitted he
20 was removed from the United States on September 9, 2012 because he is an alien. (*Id.*)

21 As part of the Plea Agreement, Petitioner acknowledged "the sentence imposed
22 will be based on the factors set forth in 18 U.S.C. § 3553(a)." (*Id.* at 6.) He agreed to a
23 joint sentencing recommendation with the Government, certifying that he understood the
24 Sentencing Guidelines are merely advisory. (*Id.* at 7.) The joint recommendation under
25 the Plea Agreement acknowledged that Petitioner had a prior conviction. (*Id.*) It further
26 stipulated that the conviction sentencing level was to be determined by the Court
27 following the preparation of a Pre-Sentence Report ("PSR"). (*Id.*) The PSR was
28 submitted to the Court on February 19, 2013. (Doc. No. 15.)

1 The PSR recommended that under U.S.S.G. § 2L1.2(b)(1)(A), Petitioner's base
2 offense level (set at level eight) be increased by sixteen levels for his felony drug
3 trafficking conviction. (Doc. No. 15 at 4, 7.) The increase resulted in an offense level
4 twenty-four with a criminal history category of IV. (*Id.*) The PSR recommended
5 subtracting three offense levels for acceptance of responsibility, for a total offense level
6 of twenty-one with a criminal history category IV (which recommends fifty-seven to
7 seventy-one months incarceration). (*Id.*); U.S.S.G. § 3E1.1(a), (b); U.S.S.G. Ch. 5, Pt. A,
8 Sentencing Table.

9 Petitioner's counsel submitted a Sentencing Summary Chart and a Sentencing
10 Memorandum, both of which comport with the PSR. (Doc. No. 19; Doc. No. 20 at 3–4.)
11 Pursuant to the Plea Agreement, Counsel did not make any sentencing requests under 18
12 U.S.C. § 3553(a) or otherwise diverge from Probation's PSR. (Doc. No. 20 at 4.)
13 However, in the Sentencing Memorandum and the Motion for Downward Departures,
14 Counsel requested an additional four-level downward departure for a fast-track
15 departure. (Doc. No. 18 at 2; Doc. No. 20 at 4.) She also requested a six-level down-
16 ward departure, citing several mitigating circumstances, for a final adjusted offense level
17 of eleven with a criminal history category of IV (eighteen to twenty-four months
18 incarceration). (Doc. No. 18 at 2; Doc. No. 20 at 4); U.S.S.G. Ch. 5, Pt. A, Sentencing
19 Table. The Court sentenced Petitioner to twenty-four months in federal prison and two
20 years of supervised release. (Doc. No. 22.)

21 Petitioner filed the instant motion to vacate, set aside, or correct the sentence
22 under 28 U.S.C. § 2255 on January 13, 2014. (Doc. No. 25.) Petitioner claims he was
23 not convicted of possessing a controlled substance for sale, but he was convicted for
24 possessing a methamphetamine pipe and sentenced to probation. (*Id.* at 2.) Petitioner
25 asserts his attorney repeatedly ignored his insistence that he was not convicted of
26 possessing a controlled substance for sale. (*Id.*) He alleges that although he told his
27 attorney that he only remembered pleading guilty to possession of a methamphetamine
28 pipe, his attorney advised him that his memory of the facts of his case are insufficient to

1 overcome the documents establishing his felony conviction. (*Id.*) He further claims his
2 attorney wrongfully assumed Probation and the Government "properly did their job" and
3 relied on the documents they produced to establish the felony conviction. (*Id.*)

4 Petitioner provided the Court with an affidavit explaining that he and his family
5 attempted to locate a record of his felony conviction, but were unable to find any record
6 of conviction. (Doc. No. 26, Ex. 1, 2.) He included a Certificate of Clerk Re: Search
7 Results from the Los Angeles Superior Court, which certified that the Clerk could not
8 find a record of conviction between the years of 1989 and 2013 for "Fernando Flores-
9 Franco," born December 17, 1962. (*Id.* at Ex. 2.) The Government filed a response in
10 opposition on February 5, 2014, and attorney Holly Hanover filed a response to the
11 motion to vacate on February 4, 2014. (Doc. Nos. 30, 31, 29.)

12 **II. LEGAL STANDARD**

13 Claims of ineffective assistance of counsel can be raised for the first time on a
14 section 2255 motion. *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir.1984),
15 *cert. denied*, 470 U.S. 1058 (1985). A defendant may waive his right to file a section
16 2255 motion to challenge his sentence, but such a waiver must state so expressly. *United*
17 *States v. Nunez*, 223 F.3d 956, 959 (9th Cir. 2000). However, a defendant may not waive
18 an ineffective assistance of counsel claim challenging the knowing and voluntary nature
19 of the plea agreement or the voluntariness of the waiver itself. *United States v. Rahman*,
20 642 F.3d 1257, 1259–60 (9th Cir. 2011).

21 The Sixth Amendment guarantees criminal defendants the right to representation
22 by counsel at every critical stage of the prosecution. *Turner v. Calderon*, 281 F.3d 851,
23 879 (9th Cir. 2002). To prevail on a claim that his trial counsel rendered ineffective
24 assistance, Petitioner must demonstrate that: (1) counsel's performance was deficient;
25 and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466
26 U.S. 668, 687 (1984). Under the first prong of the *Strickland* test, the Court does not
27 focus on whether counsel's advice was right or wrong, but whether that advice was
28 within the range of competence demanded of attorneys in criminal cases. *Turner*, 281

1 F.3d at 881. There is a "strong presumption that counsel's conduct falls within the wide
2 range of professional assistance." *Strickland*, 466 U.S. at 689; *United States v. Molina*,
3 934 F.2d 1440, 1447 (9th Cir. 1991). Under the prejudice prong, Petitioner must "show
4 that there is a reasonable probability that, but for counsel's unprofessional errors, the
5 result of the proceeding would have been different. A reasonable probability is a
6 probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at
7 694.

8 Petitioner must establish both deficient performance and prejudice in order to
9 establish ineffective assistance of counsel. *Id.* at 687; *United States v. Olson*, 925 F.2d
10 1170, 1173 (9th Cir. 1991). "Because failure to meet either prong is fatal to [Petitioner's]
11 claim, there is no requirement that [the Court] 'address both components of the inquiry if
12 the defendant makes an insufficient showing on one.'" *Gonzalez v. Wong*, 667 F.3d 965,
13 987 (9th Cir. 2011) (citing *Strickland*, 466 U.S. at 697). The Supreme Court has
14 recognized that "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v.*
15 *Kentucky*, 559 U.S. 356, 371 (2010). The same standard applies to contentions that a
16 prisoner's guilty plea is based on ineffective assistance of counsel. *See Hill v. Lockhart*,
17 474 U.S. 52, 57–58 (1985).

18 The Court may not deny a section 2255 petition without a hearing "[u]nless the
19 motion and the files and records of the case conclusively show that the prisoner is
20 entitled to no relief." 28 U.S.C. § 2255(b). In order for Petitioner to qualify for an
21 evidentiary hearing, he must make "specific factual allegations which, if true, would
22 entitle him to relief." *Baumann v. United States*, 692 F.2d 565, 571 (9th Cir. 1982).

23 **III. DISCUSSION**

24 Petitioner's motion fails to establish either of the *Strickland* prongs required to
25 succeed on an ineffective assistance of counsel claim. Petitioner failed to show that his
26 attorney's performance was deficient when she did not investigate the felony drug
27 trafficking conviction documents. He also failed to show that any deficient performance
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1 by his attorney prejudiced him with a longer sentence. Accordingly, Petitioner's section
2 2255 claim based on ineffective assistance of counsel fails.

3 **A. Deficient Performance**

4 Petitioner claims that his attorney performed deficiently when she relied on the
5 conviction documents produced by the Probation Officer and the Government. (Doc.
6 No. 25 at 2.) He argues that his counsel should have investigated his claim that he was
7 only convicted for possession of a methamphetamine pipe. (*Id.*)

8 Counsel's decision not to test the Government's records of Petitioner's felony
9 conviction did not amount to ineffective assistance of counsel. *See, e.g., United States v.*
10 *Schaflander*, 743 F.2d 714, 718 (9th Cir. 1984) (holding that an attorney's failure to
11 produce evidence to attempt "to refute the authenticity of a prejudicial document" was
12 not deficient). There was no evidence that Petitioner was only convicted of possessing a
13 methamphetamine pipe and sentenced to probation, as Petitioner claimed. *See, e.g.,*
14 *United States v. Gaydos*, No. 91-10209, 988 F.2d 123, 1993 WL 68933, *2-3 (9th Cir.
15 Mar. 11, 1993) (holding that an attorney's decision to not object to evidence of defen-
16 dant's criminal record was not ineffective assistance of counsel when "[t]here was no
17 evidence that the prior conviction had been 'totally stayed' or dismissed as [defendant]
18 initially claimed").

19 Moreover, Petitioner's counsel was provided with the felony complaint, minute
20 entry of the plea colloquy, and abstract of judgment certifying Petitioner's felony
21 conviction. (*See* Doc. No. 30, Ex. 1.) These documents conclusively establish a
22 conviction upon which Petitioner's counsel may rely. *See United States v.*
23 *Valdavinosa-Torres*, 704 F.3d 679, 688 (9th Cir. 2012) (holding that a felony complaint,
24 change of plea form, minute entry of the plea colloquy, and abstract of judgment are
25 together sufficient to establish a felony conviction).

26 Accordingly, Petitioner's ineffective assistance of counsel claim fails on this
27 ground. Even supposing that Counsel's performance was deficient, Petitioner has failed
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1 to show that any deficiency resulted in prejudice. *Wong*, 667 F.3d at 987 (holding that
2 courts need not address both *Strickland* prongs if a defendant fails under one prong).

3 **B. Prejudice to Petitioner**

4 Petitioner claims that he was prejudiced by his attorney's failure to independently
5 investigate his criminal record because there is no record of his felony conviction. (Doc.
6 No. 25 at 2; Doc. No. 26, Exs. 1, 2.) Petitioner claims that as a result, he was improperly
7 categorized as an aggravated felon and given a sentence longer than the law permits.
8 (Doc. No. 25 at 2.)

9 The Ninth Circuit held in 2012 that felony convictions for possession of metham-
10 phetamine for sale under California Health & Safety Code § 11378 are felony drug
11 trafficking offenses and thus qualify as aggravated felonies. *See Valdavinosa-Torres*, 704
12 F.3d at 686–90; *see also* 8 U.S.C. § 1101(a)(43)(B). Under the Sentencing Guidelines, if
13 a defendant was previously deported or unlawfully remained in the United States after
14 (1) being convicted of a felony drug trafficking offense, and (2) sentenced to more than
15 thirteen months incarceration, the offense is increased by sixteen levels. U.S.S.G. §
16 2L1.2(a), (b)(1)(A).

17 Petitioner was convicted of a felony drug trafficking offense. Petitioner's
18 fruitless search for his conviction documents is unpersuasive. Petitioner used the name
19 "Fernando Flores-Franco," one of his many aliases, to conduct the search. (Doc. No. 26,
20 Ex. 2; Doc. No. 15 at 2.) Additionally, he used December 17, 1962, one of his many
21 known birth dates associated with his aliases, as his birth date for the search. (Doc. No.
22 26, Ex. 2; Doc. No. 15 at 2.) Conversely, the felony conviction documents indicate that
23 "Franco Carlos Flores," born December 17, 1963 was convicted of possessing a con-
24 trolled substance for sale. (Doc. No. 30 at Ex. 1.) The PSR confirms that "Franco Carlos
25 Flores," born December 17, 1963, is one of Petitioner's aliases. (Doc. No. 15 at 2);
26 *United States v. Hanoum*, 33 F.3d 1128, 1132 (9th Cir. 1994) ("The court may adopt the
27 factual findings of the presentence report."). Accordingly, Petitioner did not find a
28 record of conviction because he used the incorrect alias to conduct the search. The

1 abstract of judgment establishes that Petitioner was sentenced to one year and four
2 months incarceration (sixteen months in total). (Doc. No. 30, Ex. 1.) Consequently, the
3 record establishes that Petitioner was previously deported after serving his more than
4 thirteen month sentence for being convicted of a felony drug trafficking offense within
5 the meaning of U.S.S.G. § 2L1.2(b)(1)(A).

6 Petitioner was not given a sentence longer than permitted by law. Under the
7 Sentencing Guidelines, Petitioner's conviction history warrants a sixteen-level increase.
8 U.S.S.G. § 2L1.2(b)(1)(A); U.S.S.G. Ch. 5, Pt. A, Sentencing Table. The Court nonethe-
9 less departed downward and sentenced Petitioner within his requested offense level
10 eleven Sentencing Guideline (which recommends eighteen to twenty-four months
11 incarceration). U.S.S.G. Ch. 5, Pt. A, Sentencing Table. The Court sentenced Petitioner
12 to twenty-four months incarceration, which is well within the Sentencing Guidelines.
13 (Doc. No. 22); *see, e.g., Rita v. U.S.*, 551 U.S. 338, 347 (2007) (holding that sentences
14 within the Sentencing Guidelines are presumptively reasonable). Moreover, as Petitioner
15 stipulated in the plea agreement, the Sentencing Guidelines are merely advisory, and
16 absent an abuse of discretion, the Court's sentence will stand. (Doc. No. 10 at 7); *see*
17 *U.S. v. Booker*, 543 U.S. 220, 233–34 (2007); *Gall v. U.S.*, 552 U.S. 38, 51 (2007).
18 Thus, Petitioner's contention that he was given an illegal sentence because of his
19 attorney's deficient performance has no merit.

20 Because the record establishes that Petitioner was convicted of a drug trafficking
21 felony, Counsel's failure to investigate his criminal record did not prejudice his sentence.
22 Accordingly, Petitioner's ineffective assistance of counsel claim fails on this ground as
23 well.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court DENIES Petitioner's motion to vacate, set
3 aside, or correct his sentence under 28 U.S.C. § 2255.

4 IT IS SO ORDERED.

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6 DATED: March 10, 2014

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8 Hon. Anthony J. Battaglia
U.S. District Judge